No. 2334

United States

Circuit Court of Appeals

For the Ninth Circuit.

UNITED STATES OF AMERICA,

Plaintiff in Error,

vs.

PORTNEUF-MARSH VALLEY IRRIGATION COMPANY, a Corporation,

Defendant in Error.

Transcript of Record.

Upon Writ of Error to the United States District Court of the District of Idaho, Eastern Division.

FILMER BROS. CO. PRINT, 330 JACKSON ST., S. F., CAL.

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INDEX TO THE PRINTED TRANSCRIPT OF RECORD.

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur. Title heads inserted by the Clerk are enclosed within brackets.]

In the District Court of the United States Within and for the District of Idaho, Eastern Division.

#149—AT LAW.

THE UNITED STATES OF AMERICA,
Plaintiff,

vs.

THE PORTNEUF-MARSH VALLEY IRRIGATION COMPANY, a Corporation,
Defendant.

Complaint.

Comes now the United States of America by C. H. Lingenfelter, United States Attorney for the District of Idaho, acting in its behalf by direction of the Attorney General of the United States, and brings this suit and complains and alleges:

1.

That the plaintiff was at all times hereinafter mentioned the owner of Sections Ten and Eleven (10 and 11) Township six (6) South, Range Thirty-eight (38) East, Boise Meridian, which said lands are by treaty reserved for the use of the Bannock and Shoshone tribes of Indians.

2.

That the aforesaid Sections Ten and Eleven (10 and 11) were at all the times hereinafter mentioned, and are now, a part and portion of the Fort Hall Indian Reservation, Bannock County, State of Idaho.

3.

That the defendant, the Portneuf-Marsh Valley Irrigation Company, is now and was at all times

hereinafter mentioned a corporation organized and existing under and by virtue of the laws of the State of Idaho, [1*] and as such corporation doing business in Idaho under the corporate name of the Portneuf-Marsh Valley Irrigation Company.

4.

That the aforesaid defendant corporation was formed for the purpose of irrigating arid lands in the State of Idaho, which said arid lands were adjacent to the said Fort Hall Indian Reservation.

5.

That on or about the 1st day of January, 1908, the defendant company, under an act of Congress of March 3, 1891, made an application to the Secretary of the Interior for a right of way over a portion of the aforesaid Sections Ten and Eleven (10 and 11) for reservoir purposes.

6.

That on the 27th day of June, 1908, the aforesaid application of said defendant company was approved by the Secretary of the Interior.

7.

That under and by virtue of said application and the approval thereof by the said Secretary of the Interior, the defendant company entered upon a portion of the lands aforesaid, to wit: Sections Ten and Eleven (10 and 11), and appropriated the said lands to its exclusive use and benefit, and constructed its reservoir thereon, and has impounded within said reservoir a large body of water to be used in irrigating certain arid lands adjoining the said Fort Hall Indian Reservation.

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*Page-number appearing at foot of page of original certified Record.

8.

That the quantity of lands so appropriated by the defendant company to its exclusive use and benefit included in said reservoir and submerged under water, [2] by virtue of its said application and approval thereof, is approximately 246.13 acres; that said 246.13 acres of land are a part and portion of the aforesaid Sections Ten and Eleven (10 and 11), and particularly described as follows, to wit:

Beginning at a point on the reservation line N. 89 degrees 56 minutes E. 567.8 ft. from the S. ¼ corner of Sec. 11, Tp. 6 S. R. 38 E. of the Boise Meridian; thence N. 11 degrees 08 minutes W. 7.1 ft.; thence N. 26 degrees 45 minutes E. 355 ft.; thence N. 55 degrees 33 minutes E. 862.9 ft.; thence N. 22 degrees 42 minutes W. 559.1 ft.; thence N. 24 degrees 49 minutes W. 1146.7 ft.; thence N. 49 degrees 13 minutes W. 984.2 ft.; thence N. 70 degrees 17 minutes W. 1091.2 ft.; thence N. 67 degrees 37 minutes W. 1400 ft.; thence S. 7 degrees 44 minutes W. 120 ft.; thence S. 35 degrees 08 minutes W. 168 ft.; thence N. 67 degrees 45 minutes W. 280 ft.; thence N. 67 degrees 45 minutes W. 280 ft.; thence S. 3 degrees 07 minutes E. 601 ft.; thence S. 13 degrees 15 minutes W. 268 ft.; thence S. 44 degrees 52 minutes E. 842.6 ft.; thence S. 26 degrees 11 minutes E. 160.3 ft.; thence S. 13 degrees 46 minutes W. 393.1 ft.; thence S. 7 degrees 06 minutes E. 692.2 ft.; thence S. 2 degrees 48 minutes W. 841.5 ft.; thence S. 6 degrees 36 minutes E. 256.3 ft.; thence N. 89 degrees 56 minutes E. 2649.3 ft.; to the place of beginning con-

taining 246.13 acres more or less.

9.

That the defendant claims the title, use and possession of said 246.13 acres of land only under and by virtue of the approval by the Secretary of the Interior of its application for a right of way for reservoir purposes under said Act of Congress of March 3, 1891.

10.

That the lands so appropriated and submerged by the said defendant company in said reservoir at the time of said appropriation were of the reasonable value of Ten Dollars ($10.00) per acre.

11.

That the defendant company has not paid and refuses to pay for any of the said 246.13 acres of land so appropriated and submerged by it under the waters in said reservoir. [3]

12.

That by reason of the defendant company appropriating and submerging the aforesaid 246.13 acres of land, the plaintiff has been damaged in the sum of Two Thousand Four Hundred Sixty-one Dollars and Thirty Cents ($2,461.30).

WHEREFORE, the plaintiff prays, judgment against the defendant in the sum of Two Thousand Four Hundred Sixty-one Dollars and Thirty Cents ($2,461.30), and the costs of suit.

(Signed) S. L. TIPTON,
Asst. U. S. Atty.

C. H. LINGENFELTER,
United States Attorney for the District of Idaho,
Residing at Boise, Idaho.

State of Idaho,
County of Ada,—ss.

C. H. Lingenfelter, being first duly sworn, on oath deposes and says that he is the United States Attorney for the District of Idaho and Attorney for the plaintiff; that he makes this affidavit for and on behalf of the United States of America; that he has read the foregoing complaint and knows the contents thereof, and that the same is true as he verily believes.

(Signed) C. H. LINGENFELTER.

Subscribed and sworn to before me this 29 day of July, 1912.

[Seal] A. L. RICHARDSON,
Clerk of United States District Court.

[Endorsed]: Filed July 29, 1912. A. L. Richardson, Clerk. [4]

In the District Court of the United States Within and for the District of Idaho, Eastern Division.

THE UNITED STATES OF AMERICA,
Plaintiff,

vs.

THE PORTNEUF-MARSH VALLEY IRRIGATION COMPANY, a Corporation,
Defendant.

Demurrer.

Comes now the defendant and demurs to plaintiff's complaint filed in the above-entitled action, and for grounds of demurrer alleges:

1.

That said complaint does not state facts sufficient to constitute a cause of action.

(Signed) EDWIN SNOW,
Attorney for Defendant.

Service accepted this 1st day of August, 1912.

(Signed) S. L. TIPTON,
Assistant U. S. Attorney.

[Endorsed]: Filed August 1, 1912. A. L. Richardson, Clerk. By E. B. Yarington, Deputy. [5]

In the District Court of the United States Within and for the District of Idaho, Eastern Division.

THE UNITED STATES OF AMERICA,
Plaintiff,

vs.

THE PORTNEUF-MARSH VALLEY IRRIGATION COMPANY, a Corporation,
Defendant.

Stipulation [That Issues Arising on Demurrer may be Submitted on Briefs, etc.].

IT IS HEREBY STIPULATED by and between C. H. Lingenfelter, United States Attorney for the District of Idaho, on behalf of the plaintiff, and Edwin Snow, on behalf of the defendant herein, that the issues arising on the demurrer to the plaintiff's complaint herein may be submitted on brief, without argument, the defendant to have twenty days from this date for the submission of its brief on demurrer, and the plaintiff to have ten days thereafter

within which to file reply brief.

Dated April 19, 1913.

C. H. LINGENFELTER,
Attorney for Plaintiff.
EDWIN SNOW,
Attorney for Defendant.

[Endorsed]: Filed April 19, 1913. A. L. Richardson, Clerk. [6]

In the District Court of the United States for the District of Idaho, Eastern Division.

THE UNITED STATES OF AMERICA,
Plaintiff,

vs.

THE PORTNEUF-MARSH VALLEY IRRIGATION COMPANY, a Corporation,
Defendant.

Opinion on Demurrer.

May 23, 1913.

C. H. LINGENFELTER, U. S. Attorney, Attorney for Plaintiff.

EDWIN SNOW, Attorney for Defendant.

DIETRICH, District Judge:

This is an action at law brought by the plaintiff to recover from the defendant $2,461.30, the alleged value of two hundred and forty-six and thirteen one hundredths acres of land on the Fort Hall Indian reservation in Southern Idaho. The facts exhibited by the complaint are, in substance, that the defendant is a corporation engaged in constructing an irrigating system for the irrigation of lands adjacent to

the reservation, a public use, and that, being in need of a reservoir site, on June 27, 1908, it made application to the Secretary of the Interior for the privilege of occupying the lands in question for such purpose. In due time the application was approved, and thereupon it constructed its reservoir.

The action is brought upon the assumption that [7] the Secretary of the Interior had no authority in law to make such a grant, and therefore his approval of the application was without jurisdiction and of no effect. In a case where a corporation engaged in a public service, and having the right or eminent domain, wrongfully enters upon lands required for its purpose without first compensating the owner, the latter may waive the tort and sue, as upon an implied contract, for the value of the land taken; and in such case the judgment, together with the satisfaction thereof, operates to effect a grant for such public use. Doubtless this rule is here relied upon by the plaintiff as a warrant both for the form of the action and the relief sought. But aside from the general merits of the controversy, there is, under the circumstances, an apparently insurmountable objection to the maintenance of such an action. If, as is argued by counsel for the Government in support of its contention, the right of occupancy of these lands as a part of the Fort Hall Indian reservation is guaranteed to the Indians by treaty stipulation and by act of Congress, and there is no law authorizing the Secretary of the Interior to grant to the defendant the privilege of using them for reservoir purposes, then admittedly no authority exists in the Executive to convey to, or confer upon,

the defendant any such right. Surely the Department at whose instance the suit is brought, and under whose direction it is being prosecuted, has no greater authority to divest the Indians of their right of possession, or to alienate the title of the Government, than has the Department of the Interior; and without statutory authority the court has no power indirectly to accomplish such an end. In that view, if the suit be prosecuted to judgment and the defendant pays the full amount claimed, what rights does it acquire? If, as is contended, the approval of [8] the Secretary of the Interior is without efficacy, what protection would such a judicial record afford to it if subsequently the Interior Department, charged with the duty of protecting the Indians and vindicating their rights, should demand that the lands be vacated? According to the plaintiff's contention, in Congress alone rests the power to dispose of the lands, and Congress has not authorized any disposition thereof, either by direct sale or indirectly through the operation of a judicial decree. For these reasons alone it must be held that the action cannot be maintained.

But also upon the merits it is thought that the demurrer is well taken. In approving the defendant's application the Secretary of the Interior doubtless assumed to act under Sections 18 and 19 of the act of March 3, 1891 (26 Stat. 1101), entitled, "An Act to repeal Timber Culture laws, and for other purposes," by which a "right of way through the public lands and reservations of the United States" is granted to any canal or ditch company formed for the purpose of irrigation, and complying with its

requirements, "to the extent of the ground occupied by the water of the reservoir and of the canal and its laterals, and fifty feet on each side of the marginal limits thereof." It is further provided that no such right of way shall "be so located as to interfere with the proper occupation by the Government of any such reservation," and further that all maps of location shall be subject to the approval of the Department having jurisdiction of such reservation. Section 19 prescribes the manner in which the canal company must proceed in order to acquire the right. Unquestionably if at the time the defendant made its application, the Secretary had any authority whatsoever to approve the [9] application of any canal company for a right of way upon an Indian reservation under any circumstances, or upon any conditions, the propriety or wisdom of his approval cannot now be called into question. If we assume that he had jurisdiction to entertain such application, admittedly his action thereon was conclusive, and is not subject to collateral inquiry; and the only question therefore is one of jurisdiction.

It is not altogether clear from the plaintiff's brief whether it contends that by the act of March 3, 1891, no such authority ever was conferred upon the Secretary of the Interior, or only that in so far as that act purports to confer the authority it has been repealed. That the authority was originally conferred I have no doubt. When the act was passed it must have been contemplated that its application would be largely, if not entirely, confined to the western States, and the "Reservations" most prominently in mind must have been Indian reservations, for

they were at the same time numerous and the most extensive reservations in the west. That an Indian reservation is a "reservation of the United States" admits of little doubt. *L. L. & G. R. Co. vs. U. S.,* 92 U. S. 733; *M. K. & T. R. Co. vs. Roberts,* 152 U. S. 114; *In re Rio Verde Canal Co.,* 27 L. D. 421. In this last case Mr. Secretary Bliss advisedly held the statute to be applicable to Indian reservations, and very, persuasively states the reasons for such conclusion. It is pointed out that there is no apparent reason why an Indian reservation should not be subject to the grant of a right of way the same as any other reservation, especially in view of the fact that the Executive Department having jurisdiction thereof may determine whether a right of way can be granted without injury to the general purpose of the reservation, **[10]** and extend or withhold approval accordingly.

The principal contention seems to be that this provision of the act of March 3, 1891, was, by necessary implication, repealed by an act of May 11, 1898 (30 Stat. 404), amending an act approved January 21, 1895, entitled "An Act to permit the use of a right of way through the Public Lands for tramroads, canals, and reservoirs, and for other purposes" (28 Stat. 635), which in turn seems to be an amplification of Section 2339 of the Revised Statutes of the United States, granting rights of way for the construction of ditches and canals used in carrying on mining operations. The section is embraced in Chapter 6, entitled, "Mineral Lands and Mining Resources." The act of January 21, 1895, provides:

"That the Secretary of the Interior be, and he hereby is, authorized and empowered under general regulations to be fixed by him to permit the use of the right of way through public lands of the United States, not within the limits of any park, forest, military or Indian reservation, for tramroads, canals, or reservoirs, to the extent of the ground occupied by the water of the canals and reservoirs, and fifty feet on each side of the marginal limits thereof, or fifty feet on each side of the center line of the tramroad, *by any citizen or any association of citizens of the United States engaged in the business of mining or quarrying, or of cutting timber and manufacturing timber.*" It will thus be seen that the scope of this grant is entirely distinct from that of the grant of March 3, 1891, which pertains exclusively to the subject of irrigation, while this act has to do only with mining and quarrying, and with the lumbering industry. The act of May 11, 1898, amends the act of 1895 by adding thereto two paragraphs, the first of which simply provides that, [11] in addition to mining, quarrying, and lumbering, the tramways, canals or reservoirs for which rights of way may be appropriated, may be used for "the purpose of furnishing water for domestic, public, and other beneficial uses." It is doubtless true that this language is broad enough to include the use to which water was to be applied under the act of March 3, 1891, but it is clear beyond peradventure that it was not intended thereby to repeal the earlier act, because in the succeeding paragraph it is declared "that the rights of way for ditches, canals

or reservoirs heretofore or hereafter approved under the provisions of Sections 18, 19, 20 and 21 "of the act of March 3, 1891, "may be used for purposes of a public nature; and said rights of way may be used for purposes of water transportation, for domestic purposes, or for the development of power, as subsidiary to the main purpose of irrigation." Here is an express recognition of the fact not only that rights of way for ditches and canals had theretofore been approved under the earlier act, but that they might thereafter be approved, and surely there could be no subsequent approval if at the time it was intended that the act conferring the authority to approve should then and there stand repealed. Instead of an intention to repeal the act of March 3, 1891, it was clearly the purpose of Congress to leave it intact, and to supplement and enlarge its scope by providing that the canals constructed in accordance with its provisions might be used not only for furnishing water for irrigation purposes, but also for other purposes of a public nature, such as transportation and power, so long as such purposes were subsidiary to the main purpose of irrigation.

The argument that the granting of such rights of [12] way upon reservation lands operates as an injustice to the Indians is based upon an assumption of conditions which do not necessarily exist. The construction of an irrigation system in part upon reservation lands may or may not diminish the value of the reservation as a whole. Conditions may be readily imagined where the value would be enhanced rather than diminished. Presumably, and such

was doubtless the view of Congress, the Executive Department will not give its approval to an appropriation substantially prejudicial to the interests of the Indians, and here we are not advised of the conditions or terms upon which the Secretary endorsed his approval.

Accordingly the demurrer will be sustained and the complaint dismissed.

[Endorsed]: Filed May 23, 1913. A. L. Richardson, Clerk. **[13]**

In the District Court of the United States Within and for the District of Idaho, Eastern Division.

#149—AT LAW.

THE UNITED STATES OF AMERICA,

Plaintiff,

vs.

THE PORTNEUF-MARSH VALLEY IRRIGATION COMPANY,

Defendant.

Judgment.

This cause came on regularly to be heard before the Hon. F. S. DIETRICH, judge of the above-entitled court, upon the demurrer of the defendant to the complaint of the plaintiff on file herein, oral argument having been expressly waived and the questions submitted on briefs, and after due deliberation thereon the Court sustained the demurrer to the complaint and rendered thereon an opinion in writing. Thereupon the plaintiff refusing to further

plead, it is ordered that the said complaint be dismissed.

WHEREFORE, by virtue of the law and by reason of the premises aforesaid, it is ordered and adjudged that said suit be dismissed and that the plaintiff have and recover nothing from the said defendant.

Judgment entered May 23, 1913. [14]

In the District Court of the United States Within and for the District of Idaho, Eastern Division.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

PORTNEUF-MARSH VALLEY IRRIGATION COMPANY,

Defendant.

Petition for Appeal.

To the Honorable F. S. DIETRICH, District Judge and Judge of the Above-named Court Presiding Therein:

Comes now the United States of America, plaintiff herein, and says that on or about the 23d day of May, 1913, this Court entered judgment herein in favor of the defendant in which judgment and the proceedings had prior thereunto in this cause certain errors were committed, to the prejudice of this plaintiff, all of which will more in detail appear from the assignment of errors which is filed with this petition.

Wherefore this plaintiff prays that a writ of error may issue in this behalf out of the United States Circuit Court of Appeals for the Ninth Circuit, for the correction of errors so complained of, and that a transcript of the record, proceedings, and papers in this cause, duly authenticated, may be sent to the said Circuit Court of Appeals.

C. H. LINGENFELTER,
Attorney for Plaintiff, and United States Attorney.

Received copy of foregoing this 7th day of October, 1913.

EDWIN SNOW,
Attorney for Defendant.

[Endorsed]: Filed Oct. 7, 1913. A. L. Richardson, Clerk. **[15]**

In the District Court of the United States Within and for the District of Idaho, Eastern Division.

UNITED STATES OF AMERICA,
Plaintiff,

vs.

PORTNEUF-MARSH VALLEY IRRIGATION COMPANY,
Defendant.

Assignment of Errors.

Now comes the plaintiff United States of America, by its attorney, and, as a part of its petition for a Writ of Error filed herein, makes the following assignment of errors which it avers were committed by the Court in the rendition of the judgment against this plaintiff appearing upon the record

herein. That is to say:

1.

The Court erred in holding and deciding that the complaint of the plaintiff did not state facts sufficient to constitute a cause of action against the defendant.

2.

The Court erred in sustaining the demurrer of the defendant to the complaint of the plaintiff.

3.

The Court erred in rendering judgment against the plaintiff upon the sustaining of the demurrer of the defendant.

4.

The Court erred in rendering judgment against this plaintiff, whereas judgment ought to have been rendered in favor of the plaintiff and against the defendant. **[16]**

Wherefore plaintiff prays that said judgment may be reversed.

C. H. LINGENFELTER,
United States Attorney, and Attorney for the Plaintiff.

Service of the above and foregoing Assignment of Errors is hereby acknowledged by receipt of a copy thereof this 7th day of October, 1913.

EDWIN SNOW,
Attorney for Defendant, Residing at Boise, Idaho.

[Endorsed]: Filed October 7, 1913. A. L. Richardson, Clerk. **[17]**

In the District Court of the United States Within and for the District of Idaho, Eastern Division.

#149—AT LAW.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

PORTNEUF-MARSH VALLEY IRRIGATION COMPANY,

Defendant.

Order Allowing Writ of Error.

This 7th day of October, 1913, came the plaintiff by its attorney, and filed herein and presented to the Court his petition, praying for the allowance of a writ of error, an assignment of errors intended to be urged by him, praying, also, that a transcript of the record and proceedings and papers upon which the judgment herein was rendered, duly authenticated, may be sent to the United States Circuit Court of Appeals for the Ninth Circuit, and that such other and further proceedings may be had as may be proper in the premises.

It is therefore ordered that the writ of error be allowed.

FRANK S. DIETRICH,
District Judge.

[Endorsed]: Filed October 8, 1913. A. L. Richardson, Clerk. [18]

In the District Court of the United States Within and for the District of Idaho, Eastern Division.

No. ——.

UNITED STATES OF AMERICA,

Plaintiff in Error,

vs.

PORTNEUF-MARSH VALLEY IRRIGATION COMPANY,

Defendant in Error.

Writ of Error.

FROM THE CIRCUIT COURT OF APPEALS OF THE UNITED STATES FOR THE NINTH CIRCUIT TO THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF IDAHO.

United States of America,—ss.

The President of the United States of America to the Judge of the District Court of the United States for the District of Idaho, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said District Court before you between the United States of America, plaintiff, and Portneuf-Marsh Valley Irrigation Company, defendant, a manifest error hath happened to the great damage of the said plaintiff, the United States of America, as is said and appears by the complaint. We being willing that such error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command

you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, [19] with all things concerning the same, to the justices of the United States Circuit Court of Appeals for the Ninth Circuit, at the courtrooms of said court in the city of San Francisco, together with this writ, so that you have the same at the said place before the justices aforesaid, on the 8th day of November, 1913, that the record and proceedings aforesaid, being inspected, the said justices of the said Circuit Court of Appeals may cause further to be done therein to correct that error what of right and according to law ought to be done.

Witness the Honorable EDWARD DOUGLAS WHITE, Chief Justice of the Supreme Court of the United States, and the seal of your said Court, affixed at Boise, this 9th day of October, 1913.

[Seal] A. L. RICHARDSON,
Clerk.

The foregoing writ is hereby allowed.

FRANK S. DIETRICH,
District Judge.

Service of the within and foregoing writ of error, together with a true copy thereof, accepted this 9th day of October, 1913.

EDWIN SNOW,
Attorney for Defendant, and Defendant in Error.
[20]

[Endorsed]: No. 149. In the District Court of the United States for the District of Idaho, Eastern Division. United States of America vs. Port-

neuf-Marsh Valley Irrigation Company. Writ of Error. Filed Oct. 9, 1913. A. L. Richardson, Clerk. [20a]

In the District Court of the United States Within and for the District of Idaho, Eastern Division.

#149—AT LAW.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

PORTNEUF-MARSH VALLEY IRRIGATION COMPANY,

Defendant.

Citation.

United States of America,—ss.

The President of the United States to Portneuf-Marsh Valley Irrigation Company and Edwin Snow Esq., Its Attorney, Greeting:

You are hereby cited and admonished to be and appear at the United States Circuit Court of Appeals for the Ninth Circuit to be held at the city of San Francisco in the State of California, within or on the 8th day of November, 1913, pursuant to a writ of error filed in the clerk's office of the District Court of the United States for the District of Idaho, Eastern Division, wherein the United States of America is plaintiff and you are defendant in error, to show cause, if any there be, why the judgment in said writ of error mentioned should not be corrected and speedy justice should not be done to the parties in this behalf.

Witness, the Honorable EDWARD DOUGLAS WHITE, Chief Justice of the Supreme Court of the United States of America, this 7th day of October, A. D. 1913, and of [21] the Independence of the United States the one hundred thirty-seventh.

FRANK S. DIETRICH,
United States District Judge, Presiding in the District Court.

[Seal] Attest: A. L. RICHARDSON,
Clerk.

Service of the foregoing citation, and the receipt of a copy thereof, is hereby admitted this 9th day of October, 1913.

EDWIN SNOW,
Attorney for Defendant and Defendant in Error. [22]

[Endorsed]: No. 149. In the District Court of the United States for the District of Idaho, Eastern Division. United States of America vs. Portneuf-Marsh Valley Irrigation Company. Citation. Filed Oct. 9, 1913. A. L. Richardson, Clerk. [22a]

Return to Writ of Error.

And thereupon it is ordered by the Court that the foregoing transcript of the record and proceedings in the cause aforesaid, together with all things thereunto relating, be transmitted to the said United States Circuit Court of Appeals for the Ninth Circuit, and the same is transmitted accordingly.

[Seal] A. L. RICHARDSON,
Clerk. [23]

[Certificate of Clerk U. S. District Court to Transcript of Record.]

In the District Court of the United States, District of Idaho, Eastern Division.

THE UNITED STATES OF AMERICA,
Plaintiff in Error,

vs.

THE PORTNEUF-MARSH VALLEY IRRIGATION COMPANY, a Corporation,
Defendant in Error.

I, A. L. Richardson, Clerk of the District Court of the United States for the District of Idaho, do hereby certify that the above and foregoing transcript of pages numbered from 1 to 24, inclusive, contain true and correct copies of the Complaint, Demurrer, Stipulation, Opinion on Demurrer, Judgment, Petition for Appeal, Assignment of Errors, Order Allowing Appeal, Writ of Error, Citation, Return to Writ of Error, and Clerk's Certificate, which together constitute the transcript of the record and return to the annexed Writ of Error.

Witness my hand and the seal of said Court affixed this 25th day of October, 1913.

[Seal] A. L. RICHARDSON,
Clerk. **[24]**

[Endorsed]: No. 2334. United States Circuit Court of Appeals for the Ninth Circuit. United States of America, Plaintiff in Error, vs. Portneuf-Marsh Valley Irrigation Company, a Corporation, Defendant in Error. Transcript of Record. Upon Writ of Error to the United States District Court of the District of Idaho, Eastern Division.

Received October 28, 1913.

F. D. MONCKTON,
Clerk.

Filed Oct. 28, 1913.

F. D. MONCKTON,
Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

By Meredith Sawyer,
Deputy Clerk.

2334

No. 2234

IN THE

UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, PLAINTIFF IN ERROR,

VS.

PORTNEUF-MARSH VALLEY IRRIGATION COMPANY, A CORPORATION, DEFENDANTS IN ERROR.

BRIEF OF PLAINTIFF IN ERROR.

ERROR TO THE UNITED STATES CIRCUIT COURT, DISTRICT OF IDAHO.

JAMES L. McCLEAR,

United States Attorney for the District of Idaho.

No. 2234

IN THE

UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, PLAINTIFF IN ERROR,

vs.

PORTNEUF-MARSH VALLEY IRRIGATION COMPANY, A CORPORATION, DEFENDANTS IN ERROR.

BRIEF OF PLAINTIFF IN ERROR.

STATEMENT OF FACTS.

This cause reaches this Court by writ of error presented by the United States. The lower court rendered judgment in favor of the defendants on demurrer to the complaint. The Government refused to further plead, and advances as error three different grounds, all of which go to the question of law as to whether or not the complaint states facts sufficient to constitute a cause of action.

The action was brought to recover from the defendants

$2461.30, the alleged value of 246.13 acres of land within the Fort Hall Indian Reservation in Idaho, appropriated by the defendant company in constructing an irrigation system for the irrigation of certain lands near the reservation.

On June 28th, 1908, the irrigation company made application to the Secretary of the Interior for a permit for such purposes which was thereafter duly approved by the Secretary in the usual manner in which such licenses are granted.

There is shown upon the face of the complaint the approval of the Secretary of the Interior, and that the company has constructed a reservoir and has impounded therein a large body of water to be used as stated in the irrigation of certain arid lands near the Fort Hall Indian Reservation, belonging to private parties.

The defendant in error, hereafter designated as the irrigation company, contends that it had the right to construct the reservoir, under authority granted by the Secretary of the Interior, pursuant to Act of Congress of March 3d, 1891, granting right of way for canals and reservoirs (Sec. 18 Act of March 3d, 1891, 26 Stat. 1101, 6 Fed. Stat. Annotated 508; Sec. 19 Act of March 3d, 1891, 26 Stat. 1102, 6 Fed. Stat. Annotated 509). The action was brought upon the theory that the Secretary of the Interior is without authority to grant such permit across the lands belonging to the Indians by virtue of a treaty hereinafter referred to, unless Congress by express statute has so authorized, and that the Act of March 3, 1891, does not bear out such construction, and that the acts of the irrigation company are without the sanction of law and the company should respond in damages for the reasonable value of the lands taken.

The Government maintains that the language used in the Act of March 3d, 1891, in Sec. 18 thereof, "that the right of way through the public lands and reservations of the

United States, is hereby granted" does not give the right of way for the purposes contended by the irrigation company across the Fort Hall Indian Reservation.

BRIEF, POINTS AND AUTHORITIES.

I.

That the Act of March 3d, 1891, has been superseded by a later act which by necessary implication repeals the Act of March 3d, 1891.

II.

That the lands in question were segregated and taken out of the category of public lands by grant and treaty of agreements with the Bannock and Shoshone Indians concluded on the 3d day of July, 1868 (Vol. 15 Stat. L. 673).

III.

Even though the Secretary had authority to grant the right of way under Act of March 3d, 1891, compensation should be allowed the Indians for the lands appropriated.

These propositions may be considered in the order named.

Proposition 1.

The repealing statute referred to was enacted by Congress May 11th, 1898, and is as follows:

> BE IT ENACTED BY THE SENATE AND HOUSE OF REPRESENTATIVES OF THE UNITED STATES OF AMERICA IN CONGRESS ASSEMBLED, That the Act entitled "An Act to permit the use of the right of way through the public lands for tramroads, canals, and reservoirs, and for other purposes," approved January twenty-first, eighteen hundred and ninety-five, be, and the same is hereby, amended by adding thereto the following:
>
> "That the Secretary of the Interior be, and hereby is, authorized and empowered, under general regulations

to be fixed by him, to permit the use of right of way upon the public lands of the United States, not within limits of any park, forest, military, or Indian reservations, for tramways, canals, or reservoirs, to the extent of the ground occupied by the water of the canals and reservoirs, and fifty feet on each side of the center line of the tramroad, by any citizen, or association of citizens, of the United States, for the purposes of furnishing water for domestic, public, and other beneficial uses.

"Sec. 2. That the rights of way for ditches, canals, or reservoirs heretofore or hereafter approved under the provisions of sections eighteen, nineteen, twenty, and twenty-one of the Act entitled 'An Act to repeal timber culture laws, and for other purposes,' approved March third, eighteen hundred and ninety-one, may be used for purposes of a public nature; and said rights of way may be used for purposes of water transportation, for domestic purposes, or for the development of power, as subsidiary to the main purpose of irrigation."

It will be observed that under the provisions of Section 2 of the Act of May 11th, 1898, reference is made to rights of way for canals or reservoirs for purposes of public nature, and said rights of way may be used for water transportation for domestic purposes or for the development of power as subsidiary to the main purpose of irrigation, and does not confer upon a private irrigation company, such as is now before the Court, the right of way across an Indian reservation, even with the approval of the Secretary of the Interior. Section 1 of the Act of May 11th, 1898, expressly states that the Secretary of the Interior is precluded from granting right of way within the limits of any park, forest, military or Indian reservation for canals, tramways or reservoirs. It is also noted that Sections 18, 19, 20 and 21 are from the Act of March 3, 1891: "An Act to repeal timber culture laws, and for other purposes," which Act is referred to in Section 2 of the Act of May 11, 1898.

It was contended by the defendant in the lower court that the Act of February 15, 1901 (37 Stat. 790), which grants the right of way over public lands, reservations and public parks for electric lines, canals, tunnels, etc., is explanatory of the word "reservations" used in the Act of March 3, 1891. The proviso under Act of February 15, 1901, clearly refutes any such interpretation and uncontrovertably shows that the permission granted by the Secretary therein to be of a temporary character and revocable at will, and which proviso is as follows:

"And provided further: That any permission given by the Secretary of the Interior under the provisions of this Act may be revoked by him or his successor at his direction, and shall not be held to confer any right or easement or interest in, to or over any public land, reservation or park."

It is also significant that the Act of March 3, 1875, which gives the right of way through public lands to railroads, that Section 5 thereof especially exempts Indian reservations from the grant, namely: "That this Act shall not apply to any lands within the limits of any military park or Indian reservation, or other lands especially reserved from sale unless such right of way shall be provided for by treaty, stipulation, or by Act of Congress heretofore passed" (18 Stat. 483).

Proposition 2.

The treaty between the United States and the Bannock and Shoshone tribes of Indians, concluded on July 3, 1868, expressly confers upon said Indians the right to the absolute and undisturbed use and occupation of the lands included within the said reservation, and for other free tribes or individual Indians as from time to time they may be willing, with the consent of the United States, to admit amongst them, and the United States solemnly agrees that no persons

except those therein designated and authorized therein to do so, and except such officers, agents and employes of the government as may be authorized to enter upon the Indian reservation in discharge of the duties enjoined by law, shall ever be permitted to pass over, settle upon, or reside in the territory described in this article (being Article No. 2 of said treaty) for the use of said Indians, and henceforth, they will and do hereby relinquish all titles, claims or rights in and to any portion of the territory of the United States except such as is embraced within the limits aforesaid.

Article 6 of said treaty gives the right to any individual belonging to said tribes of Indians, the right to select 320 acres of land within the reservation of his tribe, which tract so selected, certified and recorded in the land book, shall cease to be held in common, but the same may be occupied and held to the exclusive possession of him or his family so long as he or his family may continue to cultivate it.

Article 6. "If any individual belonging to said tribes of Indians, or legally incorporated with them, being the head of a family, shall desire to commence farming, he shall have the privilege to select, in the presence and with the assistance of the agent then in charge, a tract of land within the reservation of his tribe, not exceeding three hundred and twenty acres in extent, which tract so selected, certified and recorded in the 'land-book,' as herein directed, shall cease to be held in common, but the same may be occupied and held in the exclusive possession of the person selecting it, and of his family, so long as he or they may continue to cultivate it. Any person over eighteen years of age, not being the head of a family, may in like manner select and cause to be certified to him or her, for purposes of cultivation, a quantity of land not exceeding eighty acres in extent, and thereupon be entitled to the exclusive possession of the same as above described. For each tract of land so selected a certificate, containing a description thereof, and the name of

the person selecting it, with a certificate endorsed thereon that the same has been recorded, shall be delivered to the party entitled to it by the agent, after the same shall have been recorded by him in a book to be kept in his office subject to inspection, which said book shall be known as the 'Shoshone (eastern band) and Bannock land-book.' "

The President may at any time order a survey of these reservations, and when so surveyed Congress shall provide for protecting the rights of the Indian settlers in these improvements, and may fix the character of the title held by each. The United States may pass such laws on the subject of alienation and the descent of property as between Indians, and on all subjects connected with the government of the Indians on said reservations, and the internal police thereof, as may be thought proper."

Article 11. "No treaty for the cession of any portion of the reservations herein described which may be held in common shall be of any force or validity as against the said Indians, unless executed and signed by at least a majority of all the male Indians occupying or interested in the same; and no cession by the tribe shall be understood or construed in such manner as to deprive without his consent, any individual member of the tribe of his right to any tract of land selected by him, as provided in Article 6 of this treaty."

It is conceded that the Secretary of the Interior is the custodian of the public lands, but, when withdrawn from entry and sale as are lands within an Indian reservation, and reserved to the exclusive use and benefit of the Indians for lands ceded to the Government, the Secretary can then only dispose of said lands as Congress may direct. That the Secretary of the Interior is merely an agent appointed by law to do certain acts and perform certain duties required by law and he has no power beyond those specified in the law which creates his office and defines his powers and duties. The treaty with the Fort Hall Indians gives them a vested right

in the lands so reserved, and any attempted transfer of any part of the lands secured by treaty, would be a gross breach of public faith, and the presumption is that Congress never intended to deprive them of the lands solemnly conveyed by treaty rights.

> Leavenworth Railroad Company v. United States, 92 U. S. 733; 23 L. Ed. 634.

The Court's attention is especially directed to the use of the language in the granting clause "That the right of way through the public lands and reservations of the United States is hereby granted, etc." It is noted that the reservations mentioned are in the possessive; that is, relate to reservations which belong to the United States such as military and park reservations, where the absolute and incontestable title remains in the United States, and was not intended by Congress to refer to lands held in trust by the United States for the Indians. Such an interpretation would be a breach of public faith towards a dependent and unlettered people to take from them their lands after a solemn and binding treaty agreement made long prior to the passage of the act in question. It is incongruous to say that an official of the land department can take from the grant 246.13 acres for the use of a private corporation to irrigate lands outside the limits of the reservation. If this reasoning is sound, the power and authority rests with the Secretary of the Interior to diminish the acreage of the reserve to such an extent as to defeat the purpose of the grant, and thus deprive each individual belonging to said tribes being the head of a family from selecting a tract within the reservation of his tribe not exceeding 320 acres in extent as provided in Article 6 of the treaty.

This court gave emphasis to the importance of the principles thus enumerated in the following pertinent language:

In the case of Winters vs. United States, 143 Fed. 748,

after quoting from Kinney on Irrigation, Section 124, the Courts say: "In the application of these principles to military reservations, see Wilcox v. Jackson, 13 Pet. 498, 513, 10 L. Ed. 264. In Leavenworth R. R. Co. v. United States, 92 U. S. 733, 742, 745, 747, 23 L. Ed. 634, the court, in discussing the question whether certain lands granted to the railroad company conveyed lands which had previously been reserved for the Indians, said:

> "As long ago as the Cherokee Nation v. Georgia, 5 Pet. 1, 8 L. Ed. 25, this court said that the Indians are acknowledged to have the unquestionable right to the lands they occupy, until it shall be extinguished by a voluntary cession to the government; and recently, in United States v. Cook, 19 Wall. 591, 22 L. Ed. 210, that right was declared to be as sacred as the title of the United States to the fee. * * * With the ultimate fee vested in the United States, coupled with the exclusive privilege of buying that right, the Indians were safe against intrusion, if the government discharged its duty to them. * * * We are not without authority that the general words of this grant do not include an Indian reservation."
>
> After quoting from Wilcox v. Jackson, supra, the court said that the rule therein announced "Applies with more force to Indian than to military reservations. The latter are the absolute property of the government. In the former other rights are vested. Congress cannot be supposed to grant them by a subsequent law general in its terms. Specific language, leaving no room for doubt as to the legislative will, is required for such a purpose. * * * The treaty reserved them as much to one as to the other of the contracting parties. Both were interested therein and had title thereto. In one sense they were reserved to the Indians; but, in another and broader sense, to the United States, for the use of the Indians. Every tract set apart for special uses is reserved to the government, to enable it to enforce them." In United States v. Carpenter, 111 U.S. 347, 349, 4 Sup. Ct. 435, 436, 28 L. Ed. 451, where the court held that the location of land scrip upon lands reserved for

Indians under the provisions of a treaty with an Indian tribe, and the issue of a patent therefor, are void, Mr. Justice Field, in delivering the opinion of the court, said:

"It matters not whether the land had been surveyed or not, the treaty was notice that a part of the quarry would be retained by the government, and that the whole might be, for the use of the Indians. This purpose and the stipulation of the United States could not be defeated by the action of any officers of the Land Department."

In Missouri, etc. Ry. Co. v. Roberts, 152 U. S. 114, 118, 14 Sup. Ct. 496, 498, 38 L. Ed. 377, the court, in discussing the general question, said: "It has always been held that the occupancy of land set apart by statute or treaty with them (the Indians) for their use cannot be disturbed by claimants under other grants of the government not indicating its intention, either in express terms or by the uses to which the lands are to be applied, to change the possession of the lands. And the setting apart by statute or treaty with them of lands for their occupancy is held to be of itself a withdrawal of their character as public lands."

Where public lands were withdrawn from sale for the subsequent benefit of certain Indians the fact that the withdrawal was conditional upon the land being required for the purposes of the Indian treaty, and that the Indians were to have no rights in such lands until after legislation should invest them with legal title, did not destroy the effectiveness of the withdrawal.

United States vs. Grand Rapids & I. R. Co., 154 Fed. 136.

"The reservation clause employed in the grant in question has been attached to all railroad land grants since 1850. The words 'public lands' have been held to designate such land as is subject to sale or other disposition under the general laws, but not such as is reserved by competent author-

ity, for any purpose or in any manner, although no exception is made of it. Leavenworth, etc., R. R. Co. v. United States, 92 U. S. 733, 746, 749, 23 L. Ed. 634; Williams v. Baker, 17 Wall 144, 21 L. Ed. 561; Newhall v. Sanger, 92 U. S. 761, 763, 23 L. Ed. 769; No. Pacific R. R. Co. v. Musser-Sauntry Co., 168 U. S. 609, 18 Sup. Ct. 205, 42 L. Ed. 596; United States v. So. Pacific R. Co., 146 U. S. 570, 13 Sup. Ct. 152, 36 L. Ed. 1091; Northern Lumber Co. v. O'Brien, 139 Fed. 614, 71 C. C. A. 598; Id., 27 Sup. Ct. 249, 204 U. S. 190, 51 L. Ed. 438.

The provision in the granting act for indemnity in lieu of lands sold or pre-empted does not indicate an intention to grant any but public lands. Leavenworth, etc. R. R. Co. v. United States, supra. The fact that the withdrawal was conditional upon the land being required for the purposes of the treaty, and that the Indians were to have no rights in them until after legislation should invest them with the legal title, does not destroy the effectiveness of the withdrawal. Wolcott v. Des Moines Co., 5 Wall. 681, 18 L. Ed. 689; Wolsey v. Chapman, 101 U. S. 755, 25 L. Ed. 915; Williams v. Baker, 17 Wall. 144, 21 L. Ed. 561; Homestead Co. v. Valley R. R., 17 Wall. 153, 21 L. Ed. 622; Wisconsin Central R. R. v. Forsythe, supra; Spencer v. McDougal, supra; No. Pacific R. R. Co. v. Musser-Sauntry Co., supra.

The construction put upon the grant by the Land Department, as not excepting lands reserved for Indian purposes, cannot legally prevail against a clearly correct legal interpretation. Wilcox v. McConnell, 13 Pet. 511, 10 L. Ed. 264; Wisconsin Central R. R. Co. v. Forsythe, 159 U. S. 46, 61, 15 Sup. Ct. 1020, 40 L. Ed. 71, and cases there cited. If the views above expressed are correct, it results that the lands in question were in contemplation of law reserved from the grant of June 3, 1856, and did not legally pass thereunder."

If withdrawn lands do not apply to railroad grants, then there is a much more cogent reason that Indian reservations are not included within the Act of March 3, 1891. Leavenworth L. & G. R. Co. v. United States, 92 U. S. 733, 23 L. Ed. 634; Barton v. No. Pacific R. R. Co. 145 U. S. 535, 36 L. Ed. 806; No. Lumber Co. v. O'Brien, 204 U. S. 190, 51 L. Ed. 438; Minnesota v. Hitchcock, 185 U. S. 373, 46 L. Ed. 954; U. S. v. Oregon Central Military Road Co. 103 Fed. 554; Buttz v. No. Pacific R. R. Co. 119 U. S. 55, 30 L. Ed. 330; Mount Nebo Reservation, 13 L. D. 45; No. Pacific R. R. Co. v. Maclay, 26 L. D. 43.

We go further and say that whenever a tract of land shall have been once legally appropriated to any person, from that moment land thus appropriated becomes severed from the mass of the public lands, and that no subsequent law, proclamation or sale could be construed to embrace or operate upon it although no reservation were made of it. It applies with more force to Indian than to the military reservations. The latter are the absolute property of the Government. In Indian reservations other rights are vested. Congress cannot be supposed to grant them by subsequent law general in its terms. Specific language leaving no room for doubt as to legislative will is required for such a purpose. That land dedicated to the use of the Indians should, upon every principle of natural rights be carefully guarded by the Government and saved from a possible grant, is a principle which will command universal assent.

> Leavenworth R. R. Co. vs. United States, 92 U. S. 723, 23 L. Ed. 634.

It is not deemed that Section 13 of the Act of June 25, 1910, militates against the position taken by the Government, as the authority therein given is to reserve from location, entry, sale, allotment or other appropriations any lands within any Indian reservation valuable for power or reser-

voir sites, or which may be necessary for use in connection with any irrigation project heretofore or hereafter to be authorized by Congress, etc." This section confers upon the Secretary of the Interior, in his discretion, a right to reserve lands within Indian Reservations for irrigation companies recognized by Congress, but makes no mention of authority to grant rights of way for ditches and canals as provided under the Act of March 3, 1891, for its purposes are different in the respects enumerated.

It is noted that application for right of way in the instant case was approved by the Secretary of the Interior June 27th, 1908, and therefore the Act of June 25, 1910, above referred to would not be germane as the power thus conferred upon the Secretary is subsequent to the appropriation of the land by the irrigation company.

A treaty is the highest form of law and its provisions should not be abrogated unless Congress in its wisdom has deemed it expedient for the public good to do so. United States v. Carpenter, 111 U. S. 347, 28 L. Ed. 451; Spalding v. Chandler, 116 U. S. 404, 40 L. Ed. 473.

The Act of September 1, 1888 (25 Stat. 452), was a ratification of an agreement made with the Shoshone and Bannock Indians for the surrender and relinquishment to the United States of a portion of the Fort Hall Reservation in the territory of Idaho for the purpose of a townsite, and for a grant of right of way through said reservation to the Utah and Northern Railroad Company for other purposes. The consideration paid for the right of way for the railroad was $8.00 per acre. This agreement is referred to for the purpose of showing that there is no intention on the part of Congress to take from the Indians any of the lands within the reservation without proper authority so to do nor without just compensation.

The lower court's reasoning that the Department of Jus-

tice has no greater right than the Secretary of the Interior, is answered fully in the case of United States vs. Malle Lac Band, 229 U. S. 428, 57 L. Ed. 1299.

Third Proposition.

The number of acres granted by the United States to the Bannock and Shoshone Indians was limited by the terms of the treaty, and to hold that lands could be taken by the Secretary of the Interior, would be doing an injustice to the Indians and depriving them of the right guaranteed by the Constitution of the United States that private property cannot be taken for public use without just compensation, and a deprivation of an equal protection of the laws. In the well known case of Minnesota vs. Hitchcock, the court used the following language which bears upon the question of the right of compensation (185 U. S. 389, 46 L. ed. 963):

"Whether this tract, which was known as the Red Lake Indian Reservation, was properly called a reservation, as the defendant contends, or unceded Indian country, as the plaintiff insists, is a matter of little moment. Confessedly, the fee of the land was in the United States, subject to a right of occupancy by the Indians. That fee the Government might convey, and whenever the Indian right of occupancy was terminated (if such termination was absolute and unconditional), the grantee of the fee would acquire a perfect and unburdened title and right of possession. At the same time the Indian's right of occupancy has always been held to be sacred; something not to be taken from him except by his consent, and then upon such consideration as should be agreed upon." Buttz vs. No. Pacific R. R. Co., 119 U. S. 55, 30 L. Ed. 330; Cherokee Nation vs. Southern Kansas R. R. Co., 135 U. S. 641, 34 L. Ed. 295; New York Indians vs. U. S., 170 U. S. 1, 42 L. Ed. 927; U. S. v. Mille Lac Band, 229 U. S. 498, 57 L. Ed. 1299.

The treaty with the Indians should be construed in a way that would do exact justice to the Indians, 175 U. S. 1, 44 L. Ed. 49, Jones vs. Meehan:

> "In construing any treaty between the United States and an Indian tribe, it must always (as was pointed out by the counsel for the appellees) be borne in mind that the negotiations for the treaty are conducted, on the part of the United States, an enlightened and powerful nation, by representatives skilled in diplomacy, masters of a written language, understanding the modes and forms of creating the various technical estates known to their law, and assisted by an interpreter employed by themselves; that the treaty is drawn up by them and in their own language; that the Indians, on the other hand, are a weak and dependent people, who have no written language and are wholly unfamiliar with all the forms of legal expression, and whose only knowledge of the terms in which the treaty is framed is that imparted to them by the interpreter employed by the United States; and that the treaty must therefore be construed, not according to the technical meaning of its words to learned lawyers, but in the same sense in which they would naturally be understood by the Indians."

> "The title to the strip of land in controversy, having been granted by the United States to the elder chief Moose Dung by the treaty itself, and having descended, upon his death, by the laws, customs, and usages of the tribe, to his eldest son and successor as chief, Moose Dung the younger, passed by the lease executed by the latter in 1891 to the plaintiffs for the term of that lease; and their rights under that lease could not be divested by any subsequent action of the lessor, or by Congress, or of the executive departments. The construction of treaties is the peculiar province of the judiciary; and, except in cases purely political, Congress has no constitutional power to settle the rights under a treaty itself. Jones v. Meehan, 175 U. S. 1, 44 L. Ed. 49; Wilson v. Wall, 6 Wall. 83, 89, 18 L. Ed. 727, 729; Reichart v. Felps, 6 Wall. 160, 18 L. Ed. 849; Smith v.

Stevens, 10 Wall. 321, 327, 19 L. Ed. 933, 935; Holden v. Joy, 17 Wall, 211, 247, 21 L. Ed. 523, 535."

The lower court based its decision largely upon the case of Rio Verde Canal Co., 27 L. D. 422, opinion being rendered by Secretary Bliss, who overruled the case of Florida Mesa Ditch Co., 14 L. D. 265, and the decision of March 14, 1898, 26 L. D. 381. The reasoning of the Secretary is considered unsound, as it is said by him in the course of the opinion "The granting of the right of way over such territory is but the exercise of the right of eminent domain, which is not in violation with the treaty made with the Indians or of its obligations to reserve the lands for their sole use and benefit free from intrusion by others." If the Secretary is correct in his premise, then the element of compensation is lacking and the plaintiff in this case is entitled to recover the value of the lands thus appropriated. But is the Secretary exercising the power of eminent domain in granting right of way across lands reserved from sale or other disposition by the Government? The answer must be in the negative as the power of eminent domain guarantees the right of judicial inquiry before a court of one's peers, and is not exercised in a summary way. The legislature cannot fix the compensation or prescribe the rules for its computation. Lewis on Eminent Domain, Sec. 461.

Upon the other hand, if the Secretary is exercising the power of eminent domain, and has put the machinery in motion by permitting the irrigation company to appropriate the lands as set forth in the complaint, then there still remains the right of the plaintiff to compensation which must be determined judicially. The action instituted is for that purpose. Lewis on Eminent Domain, Sec. 461.

The Plaintiff in Error now adverts to another proposition, namely: Has the Government the right to recover damages if the Secretary of the Interior had no authority

to grant the permit for the construction of the reservoir site?

It will be conceded by the Defendant in Error, no doubt, that if the Secretary had no right to grant the permit, then the act was void and becomes functus officio, and no action upon the part of the Government will be required to cancel or revoke such permit. But the defendant in error, having already constructed the reservoir and impounded water therein, is liable and the plaintiff in error is entitled to compensation for the value of the lands unlawfully appropriated. Injunctive relief might have been obtained if the officers of the Government had been apprised in time of the commencement of construction upon the reservoir.

In law the unwarranted appropriation of land is equivalent to the taking of it and the defendant should be held to respond in damages to the Government, the custodian of the Indians, to the amount of the value of the land so taken. Angel, in his work on water courses, Section 465, says: "But there are numerous authorities sustaining the doctrine that a serious interruption to the common and necessary use of property may be equivalent to the taking of it, and that under the Constitutional provisions, it is not necessary that the land should be absolutely taken. Whenever there is actual physical invasion, compensation is due and the law then fixes the measure of that compensation to be the valuation of that part taken plus the damage to the remainder of the property resulting from such taking. *Louisville & Franklin Ry. Co. v. Brown*, 17 *B. Monroe* 763; *Hollister v. Union Co.*, 9 *Conn.* 436; *Sharp v. U. S.*, 191 *U. S.* 341.

It is conceded that the Government holds the lands in question in fee, but in trust for the Indians, and inasmuch as the Government is the proper party to institute the proceedings in behalf of the Indians, the compensation for the lands would be held by the Government in trust in lieu of the part of the lands so taken. In other words, the Indians

should receive compensation for their lands the same as a private individual should receive under like circumstances, under the principle that private property cannot be taken for public use without just compensation.

The trial Court erred in sustaining the demurrer of the defendant, and it is respectfully suggested that this Court should reverse the ruling, direct the trial court to try the case on its merits, and submit the question as to the value of the lands to a jury.

Respectfully submitted,

JAMES L. McCLEAR,
United States Attorney.